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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE MEAD CORPORATION,

Petitioner,

v.

BEAZER EAST, INC.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the only agreements that are effective to transfer liability for hazardous waste clean-up costs under section 107(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(e)(1), are indemnification agreements, not hold harmless agreements.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption. The Mead Corporation owns less than 100% of the following companies:

Northwood Forest Industries, Ltd. (50%)

Northwood Pulp & Timber Ltd. (100%)

Northwood Waferboard, Ltd. (100%)

Northwood Properties, Ltd. (100%)

B.C. Chemicals, Ltd. (50%)

B.C. Chemicals Co. (Jt. Venture - 36.4%)

Vernon Seed Orchard Co. (Jt. Venture - 30%)

Rustad Bros. & Co., Ltd. (100%)

Blackwater Construction Co., Ltd. (100%)

Bond Brothers Sawmill Ltd. (100%)

Gang-Nail Truss (P.G.) Ltd. (100%)

Aviocart S.p.A. (97%)

Mead-Emballage S.A. (99.53%)

Mead Packaging Argentina (75% owned by 100%-owned subsidiary Mead Packaging Int'l, Inc.)

Harima M.I.D., Inc. (25%)

International Fibre Sales, S.A. (33.3%)

Cabin Bluff Partners (50% owned by 100% owned subsidiary M-B Pulp Co.)

Cabin Bluff Management Co. (50% owned by 100%-owned subsidiary Mead Timber Co.)

Northwood Panelboard Co. (50% owned by 100%-owned subsidiary Mead Panelboard Co.)

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OPINIONS BELOW

The opinion of the court of appeals is reported at 34 F.3d 206 (App. A1-A28). The opinions of the district court and the magistrate judge are unreported. (App. A31-A46).

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1994. (App. A29). A timely motion for rehearing was denied on November 25, 1994. (App. A30). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 107(e)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(e)(1), provides in full:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

STATEMENT

A. Introduction

This Petition concerns the important and statutorily-guaranteed right of private parties to allocate CERCLA liabilities for hazardous waste clean-ups between themselves. When Mead sold the Woodward Coke Facility to respondent Beazer[1] in 1974, six years prior to the passage of CERCLA, the Purchase Agreement transferred to Beazer the liability for future environmental compliance costs and provided that Beazer would hold Mead harmless for such costs. When section 107(e)(1) of CERCLA was subsequently enacted, the legislation expressly preserved the right of parties to allocate private CERCLA obligations through such hold harmless agreements.

The Third Circuit, however, misinterpreted section 107(e)(1) of CERCLA to limit retroactively the scope of agreements effective under section 107(e)(1) by erroneously applying an indemnification standard of interpretation to hold harmless agreements. The standard adopted by the Third Circuit eviscerates the intention of the parties, as expressed in the Purchase Agreement, requiring Mead twenty years later to bear hazardous waste clean-up liabilities which, under well-settled principles of

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[1] Respondent Beazer East, Inc. and its predecessors -- including Koppers Company, Inc., the purchaser of the Woodward Facility -- are collectively referred to as "Beazer."

contract law and by the terms of a valid and binding contract, Beazer contractually agreed to bear.

The Third Circuit decision conflicts with decisions of the First, Sixth and Ninth Circuits which have not imposed the higher indemnification standard to the interpretation of hold harmless agreements. If the Third Circuit's mistaken view of section 107(e)(1) is left intact, it will retroactively abrogate contracts in which sophisticated parties transferred future environmental liabilities to the purchaser.

The assertion of a prior contractual allocation of liability is a principal defense in private litigation brought under CERCLA--certainly one of the largest areas of federal court environmental litigation today. Nearly every circuit court has dealt at least once with section 107(e)(1) issues and a great many cases remain in the district courts. The absence of clear law in this area fosters litigation, discourages settlements, and significantly impairs the drafting of real estate contracts.

The important distinction between indemnity obligations on the one hand and release or hold harmless agreements on the other lies at the heart of the error made by the Third Circuit below. A release or hold harmless agreement acknowledges that one party has waived its right to sue another party and serves the defensive purpose of barring such an action. An indemnity agreement, by contrast, does not merely shield such an action but goes much further and provides an affirmative cause of action. A release/hold harmless agreement leaves the liability where it stands, whereas an indemnity agreement shifts it to another party.

In light of this difference in the functions of the two types of agreements, state laws generally impose a much higher standard of proof on a party seeking to assert the presence of an indemnity agreement than on a party seeking to assert the defense that it has been released or held harmless for the liability at issue. The Purchase Agreement in this case--as asserted in

Mead's affirmative defense to Beazer's CERCLA action--plainly was a valid release/hold harmless agreement under the applicable Alabama law and should have been judged under the more relaxed standard applicable to such agreements.

The Third Circuit consistently required that the Purchase Agreement between Mead and Beazer satisfy the far stricter standards for an indemnity agreement in order to be valid under section 107(e)(1) of CERCLA, and refused even to allow the consideration of parol evidence to resolve any possible ambiguities. But, nothing in that section permits such an interpretation, which also has the result of impermissibly changing the law of contracts. In fact, that statute clearly encompasses hold harmless agreements as well. The Third Circuit's interpretation of section 107(e)(1), whereby Mead's legitimate property rights and investment-backed contractual expectation of being released will have retroactively been taken away, raises serious constitutional due process concerns. Therefore, Mead's affirmative defense based upon the release/hold harmless provisions of the Purchase Agreement with Beazer should be viable under section 107(e)(1) regardless of whether they also meet the higher standard applicable to indemnity agreements.

B. Factual Summary

The facts pertinent to this Petition are straight-forward and undisputed. The parties to this action are sophisticated businesses which, in the course of selling a large industrial facility prior to the enactment of CERCLA, chose by contract to allocate the environmental liabilities that later became at issue in this litigation.

The Woodward Coke Facility, located in Birmingham, Alabama, has been producing coke, coal tar and coke by-products from coal since the early 1900s. (App. A4). Mead acquired the Woodward Facility in 1968 and sold it six years later, in 1974, to Beazer, the world leader in the coke industry, which had constructed and maintained the facility. (App. A4-A5).

The 1974 Purchase Agreement detailed the allocation of environmental liabilities to Beazer. (App. A5). Paragraph 4(c) provides in full:

> 4. *Assumption of Agreements and Liabilities*
>
> *As of the Closing Date, Buyer shall assume and agree to perform:*
>
> . . .
>
> c. *Obligations of the Coke Plant to comply from and after the Closing Date with all of the terms and conditions of any* NPDES permit issued by the United States Environmental Protection Agency or the then permitting authority, any permit or order issued by the Alabama Water Improvement Commission and the Alabama Air Pollution Control Commission of the State of Alabama or any successor authority, any license, permit or order issued by the Jefferson County Department of Health, and of any other wastewater or runoff water discharge permit, license or order, air pollution permit, license or order, *solid waste disposal permit, license or order, hereafter issued by the United States Environmental Protection Agency and/or by the State of Alabama and/or any of its political subdivisions, all in accordance with applications now pending and listed on Exhibit F hereto.*[2] (italics added) (App. A5).

Paragraph 8(b) of the 1974 Purchase Agreement provides in full:

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[2] Exhibit F listed the then-existing air and water permits and applications for the facility.

8. *Other Covenants of Mead and Buyer*

. . .

b. *Indemnity against Assumed Liabilities*

> Buyer hereby indemnifies Mead against and hereby *agrees to hold Mead harmless from* and to reimburse Mead for any and all liabilities, losses, damages, costs of settlement and expenses (including, without limitation, reasonable attorneys' fees) which may be imposed upon or incurred by Mead in connection with any liabilities or obligations of Mead and/or the Coke Plant assumed by Buyer under this Purchase Agreement. (italics added) (App. A6).

The Purchase Agreement also provided that Beazer was buying the facility "AS IS, WHERE IS AND WITH ALL FAULTS." Paragraph 2(e). Combined with the applicable Alabama doctrine of *caveat emptor*, the "As is . . ." provision alone would have barred an action by Beazer were it not for the retroactivity provisions of CERCLA. 42 U.S.C. §§ 9607(a), 9613(f).

C. Proceedings Below

In the late 1980s, the EPA initiated proceedings against Beazer which culminated in a 1991 Consent Decree between EPA and Beazer ("EPA Order"), which will lead to the eventual clean-up of hazardous wastes at the Woodward Facility. In 1991, Beazer brought an action against Mead pursuant to sections 107 and 113 of CERCLA (and various state law claims) seeking to obligate Mead to contribute to Beazer's costs of the clean-up. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332 and principles of pendent jurisdiction.

At the outset of discovery, Beazer moved for partial summary judgment on its CERCLA claims, seeking a determination that Mead was liable for some of the clean-up costs. Mead filed

a cross-motion for summary judgment alleging that the 1974 Purchase Agreement obligated Beazer to assume, and hold Mead harmless from, any costs incurred by Beazer in connection with such environmental clean-ups. The combined effect of paragraphs 4(c) and 8(b) is that Beazer must indemnify Mead and hold Mead harmless from any expense connected to the environmental liabilities assumed by Beazer under paragraph 4(c). If the EPA Order was a "solid waste disposal order hereafter issued by EPA" under paragraph 4(c), then Beazer was required to hold Mead harmless from any costs incurred by Beazer in connection with that EPA Order.

The Magistrate Judge ruled that the Purchase Agreement was unambiguous, rendering it unnecessary to consider parol evidence, and that Mead was entitled to summary judgment on its affirmative defense. (App. A45-A46). Chief Judge Diamond adopted that opinion as the decision of the district court. (App. A31-A32).

Beazer appealed to the Third Circuit which reversed the decision of the district court, ruling that the Purchase Agreement was facially ambiguous, but did not remand to the district court for consideration of the parol evidence. 34 F.3d at 219. The effect of that decision was to abrogate retroactively Mead's contract rights which provided a complete defense to Beazer's CERCLA contribution claims.

The Third Circuit decided five issues. First, the court held that section 107(e)(1) permits parties to allocate CERCLA liabilities between themselves. 34 F.3d at 211. Second, it held that state law (here, Alabama) governs the interpretation of an agreement to determine if it meets section 107(e)(1). *Id.* at 215. Third, the Third Circuit *erroneously* interpreted section 107(e)(1) to require that contracts transferring future environmental liabilities be evaluated under the law of indemnification, notwithstanding the fact that the Purchase Agreement has a release/hold harmless provision and an "As is" clause. *Id.*

Fourth, the Third Circuit *erroneously* determined that the Purchase Agreement lacks the requisite clear and unambiguous expression of an intent by Beazer to indemnify Mead for CERCLA liabilities. Fifth, the Third Circuit *erroneously* held that, under the high standard for an indemnification agreement, Mead should not even be afforded an opportunity to use parol evidence to show that, notwithstanding any alleged ambiguities on the face of paragraph 4(c), the parties in fact unambiguously intended to require Beazer to indemnify Mead. *Id.* [3]

REASONS FOR GRANTING THE PETITION

I. CORRECTING THE DECISION BELOW IS NECESSARY TO AVOID SIGNIFICANTLY IMPAIRING THE ABILITY OF PARTIES TO ENFORCE CONTRACTS CONCERNING RESPONSIBILITY FOR THE COST OF HAZARDOUS WASTE CLEAN-UPS

This case presents an important opportunity to clarify the conflict and confusion among the circuits regarding the meaning of one of the most vital provisions of CERCLA, the principal statute underlying hazardous waste litigation in the federal courts. If left undisturbed, the decision below would significantly hinder the ability of parties to enforce their contractual rights. A statute which expressly seeks to preserve such basic contractual rights should not be interpreted to impair retroactively those rights, as the Third Circuit has done. This case is appropriate for review by this Court because, while the interpre-

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[3] Mead filed a Petition for rehearing citing the clear Alabama law which allows parties to introduce parol evidence to prove the intended meaning of a facially ambiguous indemnity agreement. The Third Circuit denied that Petition. Although the Third Circuit's interpretation of that Alabama law is not directly at issue in this Court, it illustrates the severity of the result reached by the Third Circuit. Once the Third Circuit erroneously determined that section 107(e)(1) required it to find the heightened level of unambiguity required for an indemnity agreement, it held that any ambiguity on the face of the agreement cannot be cured, no matter how persuasive a factfinder might consider the parol evidence.

tation of an agreement to determine its meaning is a question of state law, the issue of what sort of meaning/purpose will suffice to release a claim under CERCLA is a question of federal law based upon the language of section 107(e)(1). *See Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952) (federal law governs the validity of a release of a federal cause of action). The statutory interpretation of section 107(e)(1) fundamentally is a question of federal law.

A. Contractual Allocation Of Liability For Hazardous Waste Clean-up Costs Is A Vital Issue In Federal Environmental Litigation

The reach of CERCLA virtually guaranteed that it would generate a great deal of litigation, much of which would focus on the question whether a particular agreement transferred liabilities to one of the parties. *See* Ridgway M. Hall, Robert H. Harris and Judith A. Reinsdorf, *Superfund Response Cost Allocations: The Law, The Science and The Practice*, 49 Bus. Law. 1489, 1493 (1994) ("wrangling over allocation issues is one of the principal contributors to the high transactional costs associated with the Superfund program"). A salient and unique feature of CERCLA is its retroactivity whereby, pursuant to sections 107(a) and 113(f), one liable party may seek contribution from other previous owners or users of a site, regardless of when their ownership or use occurred. Any significant industrial site or landfill, etc., is likely to have had multiple owners, users, tenants, transporters, etc. during the course of its often lengthy history.

Given the high costs of hazardous waste clean-ups, any party required to clean up a site will seek contribution from as many potential defendants as possible. These defendants often will have had some form of contractual arrangement with the plaintiff or with one another, such as purchase-sale agreements, leases, transportation contracts, disposal agreements, and other contracts. These contractual arrangements nearly always raise

questions about whether the parties agreed to allocate clean-up liabilities between themselves.

Because those clauses may constitute the only real defense, litigation over their meaning and legal effect has become a major issue in CERCLA cases.[4] To date, this Court has not addressed any of the legal issues relating to the interpretation and enforcement of such clauses in CERCLA cases.

B. The Decision Below Erroneously Limited Section 107(e)(1) Of CERCLA To Indemnity Agreements

CERCLA specifically addresses the role of such contractual agreements. The first sentence of section 107(e)(1) provides that " [n]o ...agreement or conveyance shall be effective to transfer ...the liability imposed under this section," while the second sentence specifies that "[n]othing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section."

A few early cases puzzled over the seemingly inconsistent language of the two sentences of section 107(e)(1). *E.g., AM Int'l, Inc. v. International Forging Equip.*, 743 F. Supp. 525

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[4] *See* Douglas A. Henderson, *Environmental Liability and the Law of Contracts*, 50 Bus. Law. 183, 238 (1994) (there have been nearly 50 decisions evaluating contracts under CERCLA). The number of such cases precludes listing them individually but the amount of commentary on this subject is an indication of its importance. *E.g., Id.*; Thaddeus Bereday, *Contractual Transfers of Liability Under CERCLA Section 107(e)(1): For Enforcement of Private Risk Allocations In Real Property Transactions*, 43 Case W.L. Rev. 161 (1992); Penny L. Parker and John Slavich, *Contractual Efforts to Allocate the Risk of Environmental Liability: Is There A Way To Make Indemnities Worth More Than The Paper They Are Written On?*, 34 Sw. L.J. 1349 (1991); Mary K. Ryan, *The Superfund Dilemma: Can You Ever Contract Your Liability Away?*, 75 Mass. L. Rev. 131 (1990); *see also* Amy E. Aydelott, *"Cerclaing" The Issues: Making Sense of Contractual Liability Under CERCLA*, 3 Vill. Envtl. L.J. 347 (1992); Brian O. Dolan, *Misconceptions of Contractual Indemnification Against CERCLA Liability: Judicial Abrogation of the Freedom to Contract*, 42 Catholic U. L. Rev. 179 (1992); Lisl E. Miller, *Indemnification Agreements Under CERCLA*, 23 Envtl. L. 333 (1993).

(N.D. Ohio 1990), *rev'd*, 982 F.2d 989 (6th Cir. 1993). Now, every circuit court considering the issue has reconciled these two sentences by distinguishing between the fundamental liability that a party owes the government for clean-up costs and the liability of such parties to contribution actions between each other.[5] The first sentence of section 107 (e)(1) precludes private contracts from defeating a party's liability to the government and assures that the government has sufficient private resources available for clean-ups.[6]

The second sentence deals with the distinct issue whether the parties may privately allocate CERCLA liability so as to create, or preclude, any private actions for contribution or indemnity between themselves. It provides, in clear and simple language, that nothing in that section limits the rights of such parties privately to allocate their liability.

The statutory right of parties to allocate these liabilities serves several important interests. First, it preserves the basic freedom of contract. There is no public interest in precluding firms from privately allocating CERCLA responsibility. The public interest is fully protected by the first sentence of section 107(e)(1) which assures that the government's pursuit of parties to assure a clean-up is not impeded by private agreements. *Beazer*, 34 F.3d at 215. Here, the parties to the 1974 Purchase

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[5] *Joslyn Mfg. Co. v. Koppers Co.*, 40 F.3d 750 (5th Cir. 1994); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321 (7th Cir. 1994); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993); *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49 (2d Cir. 1993); *United States v. Hardage*, 985 F.2d 1427 (10th Cir. 1993); *C. P. Chem., Inc. v. Exide Corp.*, No. 93-1426, 1993 U.S. App. LEXIS 33,716 (4th Cir. Dec. 28, 1993); *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296 (6th Cir. 1992); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986).

[6] Beazer is a subsidiary of the British industrial conglomerate, Hanson plc, whose ability to finance the clean-up is not in doubt.

Agreement were sophisticated businesses that were fully capable of assessing the risks of various allocations of liability and structuring a transaction that accomplished those objectives.

Second, section 107(e)(1) promotes the predictability of contracts involving the sale, lease and use of land and facilities. *See Mardan,* 804 F.2d at 1458-60. The inability of a seller or lessor to be reasonably certain that its assignment of environmental liability to the buyer or lessee will not preclude a later contribution action complicates and hinders the consummation of such transactions. *See* Daniel R. Avery, *Enforcing Environmental Indemnification Against A Settling Party Under CERCLA*, 23 Seton Hall L. Rev. 872, 874 (1993) ("financial allocation of environmental liabilities is often the 'wild card' of the business transaction").[7]

The Third Circuit's interpretation of section 107(e)(1)[8] was wrong because nothing in that section even implies that it is limited narrowly to defined types of agreements. The only reasonable reading of that section is that any contract which is valid under the governing law will be effective as between the parties. Section 107(e)(1) creates no guidelines, or restrictions with respect to such contracts, but merely assures that an other-

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[7] *See* Henderson, 50 Bus. Law. at 185:

> The lack of predictability in the construction and interpretation of these provisions is particularly troublesome in the real property context. Prospective purchasers of corporate assets, real estate and other similarly valuable property cannot be assured, for example, that after they secure a release of environmental liabilities, the provision will withstand later judicial scrutiny. By the same token, sellers of corporate property found to be contaminated cannot be assured that their negotiated release from environmental liability will be given effect.

[8] The Third Circuit, of course, was aware that section 107(e)(1) contained the phrase "hold harmless." While not explaining its reasoning, the Third Circuit evidently erroneously assumed that that phrase was synonymous with "indemnify" and failed to recognize that the phrase also connotes defensive agreements to release parties from liability.

wise valid private contractual allocation of liability shall not be defeated by CERCLA. The reference in section 107(e)(1) to "any agreement to insure, hold harmless, or indemnify" includes the full range of agreements that could either create a cause of action based on indemnity or would defeat a cause of action based upon a hold harmless agreement, or its equivalent.

The terms of paragraph 4(c) and the structure of the 1974 Purchase Agreement demonstrate that Mead's affirmative defense based on that provision should not be reviewed under the law of indemnity. First, the language of paragraphs 4(c) and 8(b) does not speak solely in terms of the concept of indemnity. On the contrary, paragraph 8(b) expressly states that the buyer shall "hold Mead harmless" for any liabilities assumed by buyer, including those in paragraph 4(c).

Second, paragraph 4(c) makes clear that the buyer is assuming these liabilities. Once a party assumes a liability, it cannot sue the released party for contribution for that very liability.

Third, Mead's affirmative defense to Beazer's claims under CERCLA is a matter of release/hold harmless, not an action for indemnity. Mead is not seeking to recover money from Beazer but merely is seeking to fend off Beazer's CERCLA claims by raising the 1974 Purchase Agreement as an affirmative defense.

The two Alabama cases cited by the Third Circuit to support its imposition of the high standard required for an indemnity contract illustrate this distinction. *Beazer*, 34 F.3d at 215. *See Nationwide Mutual Ins. Co. v. Hall*, 643 So. 2d 551 (Ala. 1994); *Industrial Tile, Inc. v. Stewart*, 388 So. 2d 171 (Ala. 1980), *cert. denied*, 449 U.S. 1081 (1981). In those cases, the plaintiff sought indemnity as the basis for its cause of action. Neither case involved the defensive assertion of a hold harmless agreement to enforce a prior allocation of liability.

The reliance by the Third Circuit upon the law of indemnity reflects an incorrect interpretation of what sort of agreement would be permitted under section 107(e)(1). Had the Third Circuit correctly interpreted section 107(e)(1) to permit private allocations of liability which merely amounted to a release (but did not necessarily create a positive right of indemnity) then it would not have interpreted the 1974 Purchase Agreement under the harsh light of state indemnity law. The Third Circuit required that the Purchase Agreement satisfy state indemnity law in order to be viable under section 107(e)(1). That result is incorrect based both upon the terms of the Purchase Agreement and the plain language of section 107(e)(1).

C. The Decision Below Creates Further Confusion In The Law Among The Circuits

While the courts have not developed a uniform approach to the treatment of such agreements in CERCLA cases, the Third Circuit's unduly narrow interpretation of section 107(e)(1) generally is at odds with the case law from other circuits, although at least one other circuit apparently made the same error as did the Third Circuit. The First, Sixth and Ninth circuits have correctly recognized that, where a party asserts the existence of a prior contractual allocation of liability as a defense, the agreement should be analyzed as a release/hold harmless agreement. *See Boyd*, 992 F.2d at 406-07 (holding that the release was not sufficiently broad to encompass CERCLA liabilities); *AM Int'l*, 982 F.2d at 996-97 (holding that the release could bar CERCLA claims and remanding the case to the district court for fact-finding on whether the particular release met the criteria under Ohio law); *Mardan*, 804 F.2d at 1461-63 (affirming grant of summary judgment to defendant on the ground that the release covered claims under CERCLA). In *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15-16, n. 4 (2d Cir. 1993), the Second Circuit confronted an indemnity and release agreement which was asserted both offensively by the plaintiff (as a common law

indemnity claim) and defensively by the plaintiff in response to a counterclaim under CERCLA. The court treated the two contexts interchangeably, citing both the law of release and the law of indemnity, without any discussion of the significant difference between the substance of those two concepts. *Id.*[9]

In the very recent decision in *Joslyn*, the Fifth Circuit made the same error as did the Third Circuit below.[10] In *Joslyn* a buyer-defendant asserted that the terms of a prior agreement barred the seller-plaintiff from bringing a CERCLA claim to recover portions of its clean-up costs. That agreement stated that the plaintiff's predecessor "shall defend, indemnify as an insurer, and save harmless" defendant from a wide range of liabilities. 40 F.3d at 754. Despite the fact that: (1) that language, like paragraphs 4(c) and 8(b) here, encompasses both an indemnity and a release/hold harmless and (2) the terms of the agreement were asserted as a defense, the Fifth Circuit solely considered the section 107(e)(1) defense as a question of indemnity. *Id.* However, because the Fifth Circuit ultimately determined that the relevant language conveyed the requisite intent even for an indemnity agreement, the Fifth Circuit's erroneous view of section 107(e)(1) was harmless error.

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[9] A number of other cases have addressed the situation where the plaintiff (or a third-party plaintiff) seeks contractual indemnity in addition to its contribution claims under CERCLA. *Kerr-McGee*, 14 F.3d at 327; *Commander*, 991 F.2d at 54; *Hardage*, 985 F.2d at 1434; *Marmon Group, Inc. v. Rexnord, Inc.*, 822 F.2d 31, 34 (7th Cir. 1987). Each of these cases correctly applied the higher standard applicable to those true indemnity contexts.

[10] Adding to the confusion is a subsequent decision of the Third Circuit which enforced a release of CERCLA claims. *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104 (3d Cir. 1994). In *Fisher* a different panel recognized that the reference to "hold harmless" in section 107(e)(1) includes both risk-shifting agreements (such as indemnity) and risk-shielding agreements (such as releases or hold harmless). *Id.* The *Fisher* decision made no attempt to reconcile the erroneous interpretation imposed on Mead by the Third Circuit below.

Therefore, the decisions of the Third Circuit below and the Fifth Circuit in *Joslyn* stand in marked contrast to the approach taken by most other courts of appeals that have addressed this issue. Whereas these courts generally have recognized that the assertion of a prior agreement as a defense to a CERCLA claim should be treated as a release/hold harmless agreement under section 107(e)(1), the Third Circuit below and the Fifth Circuit apparently rejected that approach and erroneously treated it as a question of indemnity. *See also* Parker and Slavich, *Contractual Efforts to Allocate the Risk of Environmental Liability*, 34 Sw. L.J. 1349 n. 1 (observing that while hold harmless agreements technically serve an exculpatory function, they are sometimes confused with indemnity agreements).

Clarifying the confusion on this issue would benefit the courts, litigants and parties to real estate transactions by definitively stating the governing rules for private allocations of CERCLA liability. *See* Henderson, 50 Bus. Law at 184 ("Despite almost fifty decisions on contracts under [CERCLA]... it remains unclear when parties can and cannot contractually shift environmental responsibilities under CERCLA.... The case law on this issue ranges from the curious to the bewildering."). A decision by this Court also would reduce the enormous burden that private CERCLA cost allocation cases place on the federal courts. Stripping parties of valid contract defenses virtually forces them to litigate fact-intensive allocation issues regarding many years of operation at a site, such as the disposal and the hydrogeological movements of the various chemicals used during those many years.

D. By Limiting Section 107(e)(1) To Indemnity Agreements, The Decision Below Significantly Undermines Parties' Ability To Effectuate And Enforce Private Allocations Of Liability For Hazardous Waste Clean-Ups

The unreasonable limitation read into section 107(e)(1) by the Third Circuit below dramatically undermined Mead's rights in this case and, if followed elsewhere, would significantly frustrate parties' ability to enforce their contractual allocations of liability. In this case, like those in virtually any jurisdiction,[11] the proof required under an indemnity standard is significantly more difficult to meet than that needed to prove that the parties have entered into a valid release/hold harmless agreement. *See Nationwide*, 643 So. 2d at 555 (Alabama law requires that agreement to indemnify against one's own negligence be expressed in "clear and unequivocal language"). This heightened standard is consistent with the obvious difference between an

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[11] *E.g.*, *Southern Pac. Transp. Co. v. Sandyland Protective Ass'n*, 274 Cal. Rptr. 626, 629 (Cal. Ct. App. 1990) (California -- statute precludes indemnity for one's sole negligence); *Westinghouse Elec. Corp. v. Prudential Ins. Co. of Am.*, 547 So. 2d 721, 722 (Fla. Dist. Ct. App. 1989) (Florida -- "indemnity provision must be construed strictly in favor of the indemnitor"); *Foster v. Nix*, 327 S.E.2d 833, 837 (Ga. Ct. App. 1985) (Georgia -- contracts of indemnification are "construed strictly against the indemnitee"); *Owens v. Midwest Tank & Mfg. Co.*, 549 N.E.2d 774, 776 (Ill. App. Ct. 1989) (Illinois -- indemnity agreements are "disfavored"); *Wagner v. Regency Inn Corp.*, 463 N.W.2d 450, 456 (Mich. Ct. App. 1990) (Michigan -- indemnity agreements construed against indemnitee); *Meder v. Resorts Int'l Hotel, Inc.*, 573 A.2d 922, 928 (N.J. Super. Ct. 1989) (New Jersey -- ambiguities "strictly construed against the indemnitee"); *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989) (New York -- contracts "strictly construed" against finding a duty to indemnify); *Worth v. Aetna Casualty & Sur. Co.*, 513 N.E.2d 253, 256 (Ohio 1987) (Ohio -- indemnity must be expressed in "clear and precise terms"); *Aerospatiale Helicopter Corp. v. Uniroyal Health Servs., Inc.*, 778 S.W.2d 492, 502 (Tex. Ct. App. -- Dallas 1989) (Texas -- indemnity "strictly construed in favor of the indemnitor"), *cert. denied*, 498 U.S. 854 (1990).

indemnity and a release. While an indemnity seeks to upset the status quo, the enforcement of a release preserves it.

Requiring that only an indemnity agreement would satisfy section 107(e)(1) significantly impedes Mead's efforts to enforce the bargain it entered in 1974. Throughout its opinion the Third Circuit emphasized the high burden imposed under Alabama law on a party seeking indemnity. That Alabama requirement was a central factor in the Third Circuit's conclusion that the Purchase Agreement was not sufficiently explicit to require Beazer to indemnify Mead. *Beazer*, 34 F.3d at 216.

If, instead of employing the exacting standard for an indemnity agreement, the Third Circuit merely had asked whether it satisfied the terms of a release/hold harmless agreement, the analysis would have been quite different. Under the Alabama statute providing that releases "must have effect according to their terms and the intentions of the parties," Ala. Code §12-21-109 (1994), such agreements merely are reviewed according to ordinary rules of contract interpretation. There is no special standard imposed for an agreement to allocate liability between the parties.

A great many contracts may have been intended to allocate liability for environmental expenses in a manner sufficient to create a release/hold harmless defense in the event that the releasor brought a contribution action in federal court. But many of those contracts may lack the emphatic clarity of expression in order to meet the more demanding standard imposed under state indemnity laws. In those cases, following the decision of the Third Circuit will mean that the intent to assign liability to one of the parties will be defeated because they failed to express that intention with the heightened degree of explicitness required to meet the demonstrably inapplicable state law of indemnity.

E. The Third Circuit's Interpretation Of Section 107(e)(1) Should Be Rejected Because It Needlessly Creates Serious Constitutional Problems

It is a cardinal principle of this Court to construe statutes to avoid constitutional problems where more than one interpretation of a statute is plausible.[12] *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2282-83, (1993); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The Third Circuit's interpretation of section 107(e)(1) arbitrarily and irrationally abrogates Mead's contract rights, raising serious doubt whether the provision, as interpreted, meets due process requirements. U.S. Const. amend. V. This Court should interpret section 107(e)(1) to protect hold harmless agreements to avoid the constitutional infirmities inherent in the Third Circuit's interpretation.

Congress does not possess unlimited power to readjust rights and burdens and upset otherwise settled expectations. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 229 (1986) (O'Connor, J., concurring). Legislation violates the Due Process Clause of the Fifth Amendment when the legislature has acted in an arbitrary and irrational way. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 472 (1985); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955). Legislation impairing a private contract, whether it does so prospectively or retroactively, is unconstitutional when its consequences are particularly harsh and oppressive. *Nat'l R.R. Passenger Corp.*, 470 U.S. at 472; *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977).

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[12] This particular reason for interpreting section 107(e)(1) was not asserted below because it was never foreseen that the Third Circuit would ignore the plain language of section 107(e)(1). This constitutional argument furnishes a further reason for interpreting the section according to its express terms.

Section 107(e)(1), as interpreted by the Third Circuit and applied to the Purchase Agreement, violates the Due Process Clause by, without any rational justification, retroactively abrogating Mead's contract right to be held harmless by Beazer for CERCLA liability.[13] The Third Circuit, without explanation, excluded valid release/hold harmless agreements from the section's protection. *United States v. Sperry Corp.*, 493 U.S. 52, 64 (1989) (retroactive legislation must be justified by "rational legislative purpose").

The deprivation of Mead's rights is arbitrary and irrational, as neither related to, nor supported by, the parties' conduct or the goals of CERCLA. In recent cases it has been observed that the imposition of retroactive liability must relate to some aspect of the burdened party's conduct so that it is rational to treat the burden as the party's responsibility. *Concrete Pipe*, 113 S. Ct. at 2292 (O'Connor, J., concurring); *Connolly*, 475 U.S. at 228-36 (O'Connor, J., concurring). These cases have left open "the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee." *Id.* at 229 (*citing Turner Elkhorn*, 428 U.S. at 19, 24-26 and *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984)).

As interpreted by the Third Circuit, section 107(e)(1)'s exclusion of valid release/hold harmless agreements fails both aspects of that constitutional requirement. First, the nullification of Mead's contract rights vis-à-vis Beazer is wholly unrelated to anything Mead has done since 1974 and serves no legitimate purpose. Having paid for the hold harmless agreement in the form of a lower sale price, Mead has a legitimate investment-backed contractual expectation that Beazer will not

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[13] The freedom of contract is generally protected by the Due Process Clause of the Fifth Amendment. *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897).

be able to shift environmental liabilities back to Mead. Moreover, by precluding Mead from introducing parol evidence to show, in fact, that the parties clearly intended to allocate this liability to Beazer, particularly in light of the "As is" clause, the Third Circuit *sua sponte* denied Mead the chance to show that the heightened indemnity standard is satisfied here. The District Court had ruled on the basis of the four corners of the Purchase Agreement, expressly stating that it, therefore, did not need to review the otherwise relevant parol evidence which had been submitted to the Court. (App. A31-A32, A45 n.3). The Third Circuit erroneously failed to remand to the district court to consider the parol evidence when it found ambiguity. The Third Circuit failed to provide a rational explanation for depriving Mead of its contract rights and *sua sponte* depriving Mead the opportunity to prove the parties' contractual intentions under established law of contract interpretation.[14]

Second, the abrogation of Mead's contract rights, under the Third Circuit's interpretation of section 107(e)(1), does not further the goals of CERCLA. Denying Mead its contract rights does not promote the clean-up of CERCLA sites since, as noted above, Beazer already has been found liable to EPA and is capable of paying for the clean-up. Even if, in another case, a hypothetical owner could not afford to conduct a clean-up, the government can hold additional parties liable. Nor does the abrogation of Mead's contract rights further CERCLA's goal of placing response costs on private parties rather than on the government. CERCLA's joint and several liability scheme already ensures that either Beazer and/or other private parties, not the government, will assume all such costs.

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[14] The Third Circuit never provided any reasons why the agreement does not release Mead from CERCLA contribution claims or hold Mead harmless for CERCLA response costs -- an entirely different issue from indemnification.

Where legislation has a retroactive effect, justifications for the legislation's prospective aspects may not suffice for its retroactive aspects. Retroactive application, itself, must be justified by a rational purpose. *R.A. Gray & Co.*, 467 U.S. at 730.

Under the Third Circuit's interpretation, the retroactive nature of section 107(e)(1) is particularly oppressive toward Mead. Mead and Beazer entered the Purchase Agreement in 1974, six years before CERCLA was enacted. Thus, long before Congress and the courts devised and clarified CERCLA's liability scheme, Mead already had developed the significant investment-backed expectation that it was released from and held harmless for a substantial amount of environmental liability, including the class under which CERCLA liability falls. *See Railroad Retirement Bd. v. Alton R. R.*, 295 U.S. 330, 354 (1935) ("arbitrary imposition of liability to pay again for services long since rendered and fully compensated is not permissible legislation"). Now, twenty years after Mead was released from these sorts of environmental claims, section 107(e)(1), as interpreted by the Third Circuit, is overriding that bargain and establishing Mead as liable for the very costs out of which it had contracted in 1974.

F. Correcting The Third Circuit's Misinterpretation Of Section 107(e)(1) Will Enhance The Correct Disposition Of This Case

The central issue presented by this Petition is the interpretation of section 107(e)(1). Should this Court decide that the Third Circuit misinterpreted section 107(e)(1) and that the 1974 Purchase Agreement should be evaluated under the correct standard applicable to release/hold harmless agreements, this Court would certainly be free to conduct that determination *de novo*. Whether this Court takes that approach, or, instead, follows its usual practice of remanding the matter, a ruling that the 1974 Purchase Agreement should be reviewed under the

principles applicable to release/hold harmless agreements would significantly advance the correct resolution of this action.

Mead has very strong arguments that the 1974 Purchase Agreement allocated to Beazer the liability for future environmental liabilities, specifically including compliance with future EPA solid waste disposal orders, and that only by virtue of the strict requirements for an indemnity agreement did the Third Circuit determine that the Purchase Agreement was not sufficiently explicit to defeat Beazer's claim. Both the Magistrate Judge and the District Court reviewed the same Purchase Agreement and found that it precluded Beazer from seeking to shift to Mead the cost of complying with the EPA solid waste clean-up order at the Woodward Facility.

The Purchase Agreement makes Beazer alone responsible for the costs of complying with a wide range of environmental permits, licenses and orders, including any future solid waste disposal order issued by the EPA. There is no dispute, and the Third Circuit did not doubt, that the EPA Order which precipitated the investigation and clean-up of the Woodward Facility is a solid waste disposal order issued by EPA. Since paragraph 4(c) expressly makes Beazer liable for complying with any such orders issued after the closing date of the sale transaction, there is no time limit on the transfer of liability to Beazer.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: February 22, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3372

BEAZER EAST, INC.,

Appellant,

v.

THE MEAD CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

ARGUED FEBRUARY 15, 1994
FILED SEPTEMBER 12, 1994

D.C. Civil Action No. 91- 00408

BEFORE: BECKER, HUTCHINSON and COWEN,
Circuit Judges.

(Filed September 12, 1994)

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OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

Appellant, Beazer East, Inc. ("Beazer"), appeals an order of the United States District Court for the Western District of Pennsylvania dismissing Beazer's claims for indemnity and contribution. Beazer claimed appellee, The Mead Corporation ("Mead"), was bound by a promise to pay Beazer all or part of Beazer's response costs on a Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1994) ("CERCLA"), cleanup of a site Beazer's predecessor had acquired from Mead's predecessor. Instead, the district court granted summary judgment to Mead on Mead's counterclaim for indemnity from Beazer against Mead's response costs. In doing so, the district court adopted a United States Magistrate Judge's report and recommendation ("Magistrate Judge's Report"). The magistrate judge had concluded that Mead was a responsible party for purposes of CERCLA but that the asset purchase agreement ("Agreement") under which Beazer had acquired the site of the contaminated facility, the Woodward Facility Coke Plant (the "Woodward Facility" or "Coke Plant"), required Beazer to indemnify Mead against CERCLA liability. The magistrate judge reasoned that a provision for indemnification in a contract that predates CERCLA's enactment will govern the responsibility of the contracting parties *inter se* for payment of CERCLA cleanup costs if the indemnification or release provision is a general release from all liability arising out of a particular transfer or contains an unambiguous promise to indemnify against all liabilities that environmental law, present or future, may impose because of pollutants on the property transferred. The magistrate judge then concluded that the asset purchase agreement between Mead's predecessor, the seller, and Beazer's predecessor, the buyer of the contaminated site, unambiguously required Beazer to indemnify Mead against any liability for

injury to the environment from substances on the property, including cleanup under CERCLA, no matter who polluted the site. The paragraph in question, Paragraph 4(c) of the agreement, required the buyer and its successors to assume and perform "[o]bligations of the Coke Plant to comply from and after the Closing Date with all of the terms and conditions of any . . . solid waste disposal permit, license or order, hereafter issued by the United States Environmental Protection Agency . . . in accordance with applications now pending and listed in Exhibit F hereto." Appellant's Appendix ("App.") at 23.

On appeal Beazer argues that the district court erred in concluding this indemnity provision was unambiguously broad enough to impose on it a general duty to indemnify Mead against all environmental liability under either state or federal common law concerning the construction of such contracts of indemnity.

We agree with the magistrate judge and the district court concerning the substance if not the source of the standard that must be used in determining the effect of an indemnity clause on a party's liability under laws subsequently enacted to protect the environment. We part ways with the magistrate judge and the district court, however, in the application of this standard to the provision at hand. We agree with Beazer that Paragraph 4(c) of this agreement does not plainly and unambiguously require it to indemnify Mead for cleanup costs at the Coke Plant, and therefore reverse the order of the district court granting Mead summary judgment, vacate the order which dismisses Beazer's claim for contribution and remand for further proceedings consistent with this opinion. On remand the district court will have to consider both parties' contribution claims, and determine the proper apportionment of CERCLA liability.

I. Factual & Procedural History

Mead's predecessor, the Woodward Corporation, operated the Woodward Facility as a coke and coke-by products manufacturing facility from 1905 until 1968. In 1968, the Woodward

Iron Company merged with Mead. Mead, in turn, operated the Coke Plant until 1974, when it sold the facility and surrounding land to Beazer's predecessor, Koppers Company, Inc. ("KCI"). KCI purchased the Coke Plant under the Agreement in question. Paragraph 4 of the Agreement provides that KCI, as buyer, or its successors, will assume certain agreements and liabilities. It reads:

> As of the Closing Date, Buyer shall assume and agree to perform:
>
> a. . . . all other commitments, liabilities and obligations expressly assumed by Buyer pursuant to this Purchase Agreement.
>
> * * *
>
> c. Obligations of the Coke Plant to comply from and after the Closing Date with all of the terms and conditions of any NPDES permit issued by the United States Environmental Protection Agency or the then permitting authority, any permit or order issued by the Alabama Water Improvement Commission and the Alabama Air Pollution Control Commission of the State of Alabama or any successor authority, any license, permit or order issued by the Jefferson County Department of Health, and of any other wastewater or runoff water discharge permit, license or order, air pollution permit, license or order, solid waste disposal permit, license or order, hereafter issued by the United States Environmental Protection Agency and/or by the State of Alabama and/or any of its political subdivisions, all in accordance with applications now pending and listed on Exhibit F hereto.

App. at 22-23. Exhibit F contains a "List of Environmental Applications and Permits." It is divided into two parts, one for permits related to air and one for permits related to water.

Exhibit F lists no permits related to solid waste. All the listed permits refer to their date of issuance and the issuing authority.

Paragraph 8(a) of the Agreement requires Mead, the seller, to indemnify Beazer, the buyer, against certain other liabilities. It provides:

> a. *Indemnity Against Unassumed Liabilities.* Mead hereby indemnifies Buyer against and hereby agrees to hold Buyer harmless from and to reimburse Buyer for any and all liabilities, losses, damages, costs of settlement and expenses . . . which may be imposed upon or incurred by Buyer in connection with any liabilities or obligations of Mead other than those expressly assumed by Buyer.

App. at 29.

Paragraph 8(b), on the other hand, requires Beazer, as the buyer's successor, to indemnify Mead, as seller's successor, against other liabilities, including whatever liabilities paragraph 4(c) imposes on the buyer. It reads:

> b. *Indemnity Against Assumed Liabilities.* Buyer hereby indemnifies Mead against and hereby agrees to hold Mead harmless from and to reimburse Mead for any and all liabilities, losses, damages, costs of settlement and expenses . . . which may be imposed upon or incurred by Mead in connection with any liabilities or obligations of Mead and/or the Coke Plant assumed by Buyer under this Purchase Agreement.

App. at 30.

In 1977, KCI transferred the Coke Plant and surrounding land to the Industrial Development Board of the City of Fairfield, Alabama ("IDB"). In turn, IDB leased the premises back to KCI. KCI continued to operate the facility. In 1988, Beazer acquired KCI and transferred the lease to a newly created

corporation, Koppers Industries, Inc. ("KII"). At about this same time IDB transferred its ownership interest in the Coke Plant and the surrounding land back to KII.

In 1981, the United States Environmental Protection Agency ("EPA") and the Alabama Department of Environmental Management began to investigate the Coke Plant site for toxic substances. As a result, EPA asked Beazer to sign an Administrative Order on Consent (the "Order") that would require Beazer to do a site-wide environmental investigation and eventually cleanup the site. On June 21, 1991, Beazer signed the Order. Issued pursuant to the Solid Waste Disposal Act, it identifies thirty-nine problem areas at the Coke Plant. The Order calls each of them a "solid waste management unit." Beazer agreed to test each of these units for the presence of toxic wastes and then clean them up as necessary.

On March 6, 1991, Beazer filed this action. The complaint, following amendment and dismissal of several counts, claimed contribution from Mead against any response costs Beazer incurred under CERCLA, 42 U.S.C.A. §§ 9607(a), 9613(f), or indemnification from Mead based on Paragraph 8(a) of the Agreement. Under the Agreement's indemnification provisions, Beazer claimed that the expense of investigating the toxicity of these areas and cleaning them up was ultimately Mead's responsibility. Beazer also alleged that many of the solid waste management units it agreed to cleanup are parts of the site that Mead had dedicated to waste management but Beazer had never utilized while it was operating the facility.

Mead denied any obligation either to indemnify Beazer against these costs or to contribute to the cost of testing, investigating or cleaning up the site. It also asserted a counterclaim under Paragraph 4(c) of the Agreement demanding that KCI and Beazer, as KCI's successor in interest, indemnify Mead, hold it harmless and reimburse it for all response costs that investigation and cleanup of toxic wastes deposited on or in the Coke

Plant or its environs may require. In another counterclaim, Mead asserted, in the alternative, a right to contribution from Beazer for any CERCLA costs Mead might be required to pay.

Beazer filed a motion for a partial summary judgment seeking a declaration that Mead was a responsible operator under sections 107(a) and 113(f) of CERCLA, and that Paragraph 8(a) of the Agreement required Mead to indemnify Beazer against liability for all response costs. Mead filed a cross-motion for summary judgment asserting that Paragraph 4(c) of the Agreement relieved it of any obligation to indemnify Beazer or contribute to any cleanup costs Beazer might incur, and that Paragraphs 4(c) and 8(b) combined to obligate Beazer to indemnify Mead against any CERCLA response costs Mead might incur.

The magistrate judge to whom the district court had referred these motions issued a report recommending that Mead be held liable as a "responsible party" for any government paid response costs, that Mead's cross-motion for summary judgment against Beazer be granted and that Beazer's action be dismissed in its entirety. Beazer filed timely objections, but the district court adopted the Magistrate's Report as its opinion, granted Mead's cross-motion for summary judgment and dismissed all of Beazer's claims. Beazer filed this timely appeal.

II. Jurisdiction & Standard of Review

The district court had subject matter jurisdiction over this case under 28 U.S.C.A. §§1331, 1332, 1367 (West 1993) and 42 U.S.C.A. § 9613(b) (West Supp. 1993). We have appellate jurisdiction over the district court's final order dismissing Beazer's claims and granting Mead's counterclaim under 28 U.S.C.A. § 1291 (West 1993).

We exercise plenary review over a district court's grant of summary judgment. Viewing the evidence in the light most favorable to the non-moving party, we must determine whether

there remain any genuine issues of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. *See Bank of Nova Scotia v. Equitable Fin. Management, Inc.*, 882 F.2d 81, 83 (3d Cir. 1989).

III. Analysis

Section 9607(e)(1) of CERCLA provides:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C.A. § 9607(e)(1) (West 1983). On first reading, this appears internally inconsistent. We have reconciled its two sentences by construing them to mean "agreements to indemnify or hold harmless are enforceable between the parties but not against the government." *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029, 102 L. Ed. 2d 969, 109 S. Ct. 837 (1989); *See also United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993) (Under section 9607(e)(1) "responsible parties may not altogether transfer their CERCLA liability, [but] they have the right to obtain indemnification for that liability.") (citations omitted) (emphasis in original). As the district court recognized in *Hatco Corp. v. W.R. Grace & Co.—Conn.*, 801 F. Supp. 1309 (D.N.J. 1992):

> Because § 9607(e)(1) renders ineffective any attempt to completely "transfer liability, the most a party can do to limit its liability under CERCLA is to obtain from another an agreement "to insure, hold harmless, or indemnify" it from any liabilities established against it.

Id. at 1317 (quoting 42 U.S.C.A. § 9607(e)(1)).

Thus, Beazer could have lawfully agreed to indemnify Mead for its CERCLA liability or, conversely, Mead could have lawfully agreed to indemnify Beazer. The issue is whether either did so. The Agreement the parties rely on was executed before CERCLA was enacted. Therefore, we must, at the outset, resolve the preliminary issue of whether a contract of indemnity that predates CERCLA can be construed to include indemnity against CERCLA liability. This is a question of first impression in this Court.

Other courts that have analyzed pre-CERCLA indemnity provisions have uniformly held that a pre-CERCLA agreement can require one party to indemnify another against CERCLA liability. *See, e.g., Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.,* 14 F.3d 321, 327 (7th Cir. 1994); *Hatco Corp.,* 801 F. Supp. at 1317-18; *Purolator Prods. Corp. v. Allied-Signal, Inc.,* 772 F. Supp. 124, 132 (W.D.N.Y. 1991); *Mobay Corp. v. Allied-Signal, Inc.,* 761 F. Supp. 345, 356-58 (D.N.J. 1991). We find the reasoning of these courts persuasive. Accordingly, we hold that a pre-CERCLA agreement can require an indemnitor to hold the indemnitee harmless from CERCLA liability.

Nevertheless, not all pre-CERCLA promises to indemnify cover CERCLA liability. We must look to see whether an indemnification provision is either specific enough to include CERCLA liability or general enough to include any and all environmental liability which would, naturally, include subsequent CERCLA claims. The first step in this inquiry is to determine what law applies to the construction or interpretation of contractual provisions that affect responsibilities Congress has imposed on us in statutes enacted to enforce this nation's strong commitment to a clean, safe and attractive environment. We now turn to this issue, also one of first impression in this Court.

A.

In deciding what law to apply to determine whether Paragraphs 4(c) and 8(a) establish an obligation for Beazer to indemnify Mead against CERCLA liability or Mead to indemnify Beazer, the magistrate judge looked first to the law the parties chose in Paragraph 13(k)(1) of the Agreement. It provides that Alabama law will govern.[1] Seeing "no reason to frustrate the obvious and expressed intent of the parties," the magistrate judge said he would apply Alabama law to decide whether the Agreement's indemnity provisions were clear enough to require Beazer to hold Mead harmless against CERCLA liability at the site. Magistrate Judge's Report at 9.

Finding no Alabama law directly on point, the magistrate judge took a cue from the holdings of the United States District Court for the District of New Jersey that pre-CERCLA agreements may cover CERCLA liability if such agreements are "worded broadly enough to encompass any and all liabilities, or if environmental liability is clearly referred to in the agreement." *Id.* at 9-10 (*citing Hatco Corp.*, 801 F. Supp. at 1318; *Purolator Prods. Corp.*, 772 F. Supp. at 132; *Mobay Corp.*, 761 F. Supp. at 356; *Southland Corp. v. Ashland Oil Inc.*, 696 F. Supp. 994 (D.N.J. 1988)). After concluding that Alabama law on the meaning of contracts was not inconsistent with this developing standard of federal common law, the magistrate judge saw no impediment to interpreting the Agreement under Alabama contract law. Nevertheless, he pointed out that construction or interpretation of a pre-CERCLA indemnity clause's effect on CERCLA liability might "be an issue best determined by a uniform federal rule . . . and that the federal case law establishing the standard under CERCLA may override any inconsistent state law in this respect." *Id.* at 10 n.2.

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[1] The paragraph states, "Each of the parties elects that this Purchase Agreement shall be governed, construed and enforced in accordance with the laws of the State of Alabama." App. at 44-45.

The first question that we should ask is whether the national interest in uniform application of federal statutory law requires federal courts to develop a federal common law to preclude willy-nilly use of various state law principles in interpreting or construing indemnification provisions that affect liabilities under CERCLA. *Cf. O'Melveny & Myers v. Federal Deposit Insurance Corp.*, 114 S. Ct. 2048, 2052-55 (1994).

Generally, federal law governs the validity of an agreement releasing a cause of action arising under federal law; *see Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361, (1952), but the construction or interpretation of a private contract is generally thought to be a question of state law. Accordingly, most courts have recognized that imposition of CERCLA liability on a successor corporation is a question of federal law. *See, e.g., John S. Boyd, Co. v. Boston Gas. Co.*, 992 F.2d 401, 406 (1st Cir. 1993); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 (9th Cir. 1986); *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318 326-28 (D. Md. 1993); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1266, 1267-68 (E.D. Va. 1992).

Nevertheless, all of the courts of appeals that have considered developing a federal rule of decision appear to have decided it is better to look to state law in interpreting or construing a contract's indemnification provisions vis-a-vis CERCLA.[2]

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[2] *See John S. Boyd Co.*, 992 F.2d at 406 (incorporating state law into federal law to construe an agreement pertaining to CERCLA liability); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993)(state law supplies the principles that govern the construction or interpretation of indemnification clause applicable to CERCLA liability); *Hardage*, 985 F.2d at 1433 & n.2; *Mardan Corp.*, 804 F.2d at 1458, 1460 (holding that federal courts should look to applicable state law to decide the validity of releases of claims under CERCLA); *see also City of Phoenix, Az. v. Garbage Servs. Co.*, 827 F. Supp. 600, 602-03 (D. Ariz 1993)("When developing federal common law, the court must decide whether to fashion a nationally uniform federal rule, or incorporate state law as the federal rule of decision. . . . The Ninth Circuit Court of Appeals has taken both approaches when filling in the

In *John S. Boyd Co.*, the United States Court of Appeals for the First Circuit looked to the Massachusetts law of contracts to apportion CERCLA liability among contracting parties *inter se*. In construing the parties' written agreement, it said, "state contract law . . . provide[s] the substantive rule, so long as it is not hostile to the federal interests animating CERCLA." *John S. Boyd Co.*, 992 F.2d at 406 (citations omitted); *Hardage*, 985 F.2d at 1433 n.2 ("Because the government's interests are unaffected by the allocation of liability between jointly and severally liable parties, we easily conclude that a uniform federal rule is unnecessary and that state law will govern the indemnification clauses."); *see also O'Melveny*, 114 S. Ct. at 2055 ("Our cases uniformly require the existence of [a significant conflict between some federal policy or interest and the use of state law] as a precondition for recognition of a federal rule of decision.").

The United States Court of Appeals for the Ninth Circuit has analyzed the issue of choosing state or federal common law to determine whether private indemnification agreements cover CERCLA liability in depth. *See Mardan Corp.*, 804 F.2d at 1458-60. In *Mardan Corp.*, the government, in an *amicus* brief, argued for state law to provide the substance of the decision rule. It said that "whether and when agreements between private 'responsible parties' can settle disputes over contribution rights under [CERCLA]" did not require the development of a uniform federal rule. *Id.* at 1458. The court of appeals stated:

> Section [9607(e)(1)] expressly preserves agreements to insure, to hold harmless, or to indemnify a party held liable under [CERCLA]. Absent CERCLA, these contracts would be interpreted under state law.

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gaps left by CERCLA, depending on the context.") (citations omitted); *cf. HRW Sys. Inc.*, 823 F.Supp. at 328 (adopting federal "continuity of enterprise test endorsed by Fourth Circuit rather than state law to determination of corporate successor liability"); *Chesapeake & Potomac Tel.*, 814 F.Supp at 1268 (same).

> By preserving such agreements, Congress seems to have expressed an intent to preserve the associated body of state law under which agreements between private parties would normally be interpreted. Certainly federal courts need not fashion federal common law to interpret every settlement of liability that arises under federal statutes.

Id.

Because Congress's intent to require a federal rule of decision was "not entirely clear," the court of appeals considered whether the policies Congress sought to advance by enacting CERCLA required a uniform federal standard for the interpretation and construction of indemnity clauses. For guidance it looked to the Supreme Court's opinion in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). *Id. Kimbell Foods* set out the factors courts should use to determine when a uniform federal rule is needed to decide federal claims based on federal statutes when Congress has not made clear its intent on what law should supply a rule of decision. *See Kimbell Foods,* 440 U.S. at 728-29. They are:

> (1) whether the issue requires "a nationally uniform body of law"; (2) "whether application of state law would frustrate specific objectives of the federal programs"; and (3) whether "application of a federal rule would disrupt commercial relationships predicated on state law."

Mardan Corp., 804 F.2d at 1458 (*citing Kimbell Foods,* 440 U.S. at 728-29). The court of appeals in *Mardan Corp.* applied *Kimbell Foods* and concluded there was no need for a federal common law standard. It stated:

> First, we find no reason to think that the issue requires a uniform body of law. Commercial enterprises selling their assets or insuring themselves will normally look to state

> law to interpret their indemnification provisions, which will generally indemnify the enterprises against a whole host of possible liabilities. Disuniformity does not seem to impose any particular burden. . . .
>
> Second, the application of state law to interpret such releases will not frustrate the objectives of CERCLA. Contractual arrangements apportioning CERCLA liabilities between private "responsible parties" are essentially tangential to the enforcement of CERCLA's liability provisions. Such agreements cannot alter or excuse the underlying liability, but can only change who ultimately pays that liability. . . .
>
> * * *
>
> Finally, we are convinced that application of a federal rule . . . would disrupt commercial relationships predicated on state law. . . . Creating a federal rule to govern CERCLA releases would introduce confusion and uncertainty into these commercial relationships in two respects. One, buyers and sellers would face greater confusion about which body of law to turn to. Two, the creation of a federal rule, as opposed to incorporating a ready-made and fully fleshed out body of state law, would, during the development of that federal rule, leave parties very uncertain about what rule governed CERCLA releases. . . .

Id. at 1458-60.

Judge Reinhardt, in a dissent in *Mardan Corp.*, thought that a uniform federal rule should be applied to determine whether any particular agreement indemnified against CERCLA liability. *Mardan Corp.*, 804 F.2d at 1463 (Reinhardt, J., dissenting). Citing cases that adopted uniform federal rules to determine liability under section 9607 and the legislative history of that section stressing the need for "'a uniform rule of law . . . to discourage business[es] dealing in hazardous substances from

locating primarily in states with more lenient laws,'" Judge Reinhardt reasoned that "a uniform federal rule regarding releases from CERCLA liability serves Congress' goals in the same manner that a uniform rule regarding liability does." *Id.* at 1464 (*citing* 5 U.S.C.C.A.N. 6119, 6119-20, 6132 (1980) and *quoting* 126 Cong. Rec. H11787 (daily ed. Dec. 3, 1980) (statement of Representative Florio, CERCLA House sponsor) (alteration in original)). *But see id.* at 1459-60 (majority opinion) (arguing that parties are still fully liable to the government regardless of applicable law and concluding that adoption of state law does not conflict with congressional purpose underlying CERCLA).

Though this Court has yet to consider what law should govern the construction or interpretation of any particular indemnity provision on the apportionment of CERCLA liability among contracting parties, we have adopted a federal common law standard in other environmental contexts.[3] In *Smith Land & Improvement Corp. v. Celotex Corp.*, we stressed the need for uniform standards if CERCLA is to be effective and indicated that a district court considering successor liability under CERCLA should look to "[t]he general doctrine of successor liability in operation in most states . . . rather than the excessively narrow statutes which might apply in only a few states." *Smith Land & Improvement Corp.*, 851 F.2d at 92. We reasoned if we refused to apply uniform federal standards to regulate CERCLA liability, "CERCLA aims may be evaded easily by a responsible party's choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability." *Id.* In *Lansford-Coaldale Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993), we also expressed a prefer-

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[3] It is perhaps material to note that these standards do not spring full formed and grown from the heads of federal judges as Athena did from Zeus nor does and Delphic oracle whisper uniformly in each judge's ear. *See* Manfred Lurker, Dictionary of Gods and Goddesses, Devils & Demons 44-45 (1987).

ence for uniform federal standards to govern CERCLA liability. We held that "given the federal interest in uniformity in the application of CERCLA, it is federal common law, and not state law, which governs when corporate veil-piercing is justified under CERCLA." *Id.* at 1225 (citations omitted).

None of our cases, however, deal with the need for a federal standard in interpreting or construing contracts to indemnify and our sister courts of appeals have uniformly selected state law. *See supra* note 2. Fortunately we see no need to create a circuit conflict and will join the other courts of appeals that look to the law of a particular state concerning the construction or interpretation of contracts of indemnity to determine whether a particular indemnification provision covers CERCLA liability. We thus endorse the majority's reasoning and application of the *Kimbell Foods* test in *Mardan Corp.*

Moreover, we see support for this principle in the Supreme Court's recent decision in *O'Melveny & Myers.* It teaches us that special federal rules are justified only in "situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny & Myers,* 114 S. Ct. at 2055 (*quoting Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68, (1966)).

In *O'Melveny & Myers,* the Supreme Court considered whether federal or state decisional law should govern the question of imputation of knowledge in a suit where the FDIC sued in its capacity as receiver for a federally insured bank that had failed. The FDIC argued that *Kimbell Foods* required the district court to apply a uniform federal rule of decision to determine FDIC's rights because "federal law governs questions involving the rights of the United States under nationwide federal programs." *O'Melveny & Myers,* 114 S. Ct. at 2053 (*quoting Kimbell Foods,* 440 U.S. at 726). The Supreme Court first stated, "[T]he FDIC is not the United States, and even if it were we would be begging the question to assume that it was

asserting its *own* rights rather than, as receiver, the rights of [the failed bank.]" *Id.* (emphasis added). It went on to note, "The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of *private actors* that has already occurred." *Id.* at 3055 (emphasis added). The Supreme Court then held that the issue of imputed knowledge in bank receivership cases "is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." *Id.* at 2056.

How Beazer and Mead apportion their CERCLA liability among themselves does not affect the primary duty they owe the United States to clean up the poisons left to befoul the site both used. Whether one must indemnify the other concerns instead the liability of private actors for acts already done, just as the liability of the alleged tortfeasor in *O'Melveny* involved the FDIC's right, as successor to the private right of an injured party, to recover for the injuries its predecessor had suffered as a result of past acts. How much Beazer or Mead pay each other seems to us to have even less effect on the United States than did the ability of FDIC to recover for tort injuries suffered by the failed bank it took over. The interpretation and construction of Paragraph 4(c) has no impact on either party's liability to the government. *See Smith Land & Improvement Corp.*, 851 F.2d at 89. On reason as well as authority, we therefore hold that state law should determine whether any particular contract of indemnity provision can be construed generally or broadly enough to cover one responsible party's liability to another.

B.

Having determined that state law on the interpretation and construction of indemnification agreements applies to this case, we turn to the question of what state law should be applied. On

that issue, we can quickly agree with the district court and apply Alabama law. [4]

We look to decisions of the Alabama courts and especially those of the Supreme Court of Alabama. Its most recent decision concerning the interpretation or construction of indemnification provisions is *Nationwide Mutual Insurance Co. v. Hall*, Nos. 1921128 & 1921272, 1994 WL 107547 (Ala. April 1, 1994). There, it held that indemnification agreements are enforceable in Alabama if "'the parties knowingly, evenhandedly, and for valid consideration, intelligently enter into an agreement whereby one party agrees to indemnify against the indemnitee's own wrongs, [and if that agreement is] expressed in clear and unequivocal language.'" *Nationwide Mut. Ins. Co.*, Nos. 1921128 & 1921272, 1994 WL 107547 at * 3 (*quoting Industrial Tile, Inc. v. Stewart*, 388 So. 2d 171, 175-76 (Ala. 1980), *cert. denied*, 449 U.S. 1081, (1981) (alteration in original)). In *Nationwide*, Alabama's supreme court recognized that indemnity agreements covered only those incidents within their plain meaning and the court expressed a strong preference for this limitation. *Id.* (*quoting Craig Constr. Co. v. Hendrix*, 568 So. 2d 752, 757 (Ala. 1990); *Industrial Tile, Inc.*, 388 So. 2d at 176). The supreme court then stated that "an indemnity contract

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[4] We again note the magistrate judge, despite his summary conclusion that Alabama law controls, seems to have applied the standard adopted by the United States District Court for the District of New Jersey. That court has used a federal standard to conclude that an indemnification or release provision which affects a party's CERCLA liability must be:

> (1) a broad waiver of "all liabilities of "*any* type whatsoever". . .which would clearly evince the parties' broad intent to finally settle *all* present and future liability issues arising from the sale,; or (2) at a minimum, "must at least mention that one party is assuming [all] environmental-type liabilities". . .which would clearly evince the parties' intent to settle all issues related to present and future environmental liabilities.

Hatco Corp., 801 F.Supp. at 1317-18 (*quoting and citing Mobay Corp.*, 761 F.Supp. at 358 & n.15) (emphasis in original). The magistrate judges states, however, that he used this standard because it is consistent with Alabama law.

purporting to indemnify for the consequences of the indemnitee's own negligence is unambiguous, and therefore, enforceable when its language specifically refers to the negligence of the indemnitee. . . . [but that] such 'talismanic' or thaumaturgic language is not necessary if the requisite intent is otherwise clear." *Id.* (citations omitted). [5]

We conclude that Alabama law requires a plain and unambiguous expression of intent to cover the cost of the liability in question. Using this standard, we now consider whether Paragraph 4(c) unambiguously expresses Beazer's intent to indemnify Mead against CERCLA liability.

C.

The crux of the parties' argument concerns the district court's conclusion that Beazer expressly and unambiguously agreed to indemnify Mead for its CERCLA liability.[6] They disagree as to whether the magistrate judge correctly applied Alabama's limiting standard to the Agreement. Paragraph 4(c) reads:

> 4. *Assumption of Agreements and Liabilities*
>
> As of the Closing Date, Buyer [Beazer] shall assume and agree to perform:
>
> * * *
>
> c. Obligations of the Coke Plant to comply from and after the Closing Date with all of the terms and conditions of . . . any solid waste disposal permit, license or order, hereafter issued by the United States Environmental Protection Agency . . . all in accordance with applications now pending and listed on Exhibit F hereto.

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[5] We do not think Alabama would apply a different rule in deciding whether an indemnity clause covers strict liability under environmental law.

[6] Whether an agreement is unambiguous is a question of law. *McDonald v. U.S. Die Casting & Dev. Corp.*, 585 So. 2d 853, 855 (Ala. 1991).

App. at 23.[7] Exhibit F is divided into two parts. Beazer argues that Paragraph 4(c) limits its agreement to assume Mead's environmental liabilities to the permits mentioned in Exhibit F's "List of Environmental Applications and Permits." Because neither part of Exhibit F mentions any solid waste permit, Beazer contends that Paragraph 4(c)'s promise to indemnify does not unambiguously cover CERCLA response costs incurred in removing any toxic wastes found in or around the Coke Plant.

After concluding that Paragraph 4(c) did not unambiguously rule out a promise to indemnify Mead against CERCLA liability, the magistrate judge went on to consider whether it unambiguously required Beazer to indemnify Mead for CERCLA liability under the federal standard announced in *Mobay Corp*. He acknowledged that Paragraph 4(c) was not a broad, general promise to indemnify Mead against all liability. Nevertheless, he concluded that the text of the paragraph

> clearly implies that, as between Beazer and Mead, Beazer would be responsible for any environmental liability arising from the Woodward Facility after the date of the sale. Even more than this implication regarding all environmental liability, the provision expressly provides that

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[7] Beazer's duty to indemnify is controlled by Paragraph 8(b) of the Agreement which provides:

> Buyer [Beazer] hereby indemnifies Mead against and hereby agrees to hold Mead 1507 harmless from and to reimburse Mead for any and all liabilities, losses, damages, costs of settlement and expenses . . . which may be imposed upon or incurred by Mead in connection with any liabilities or obligations of Mead and/or the Coke Plant assumed by Buyer under this Purchase Agreement.

App. at 30. The obligations imposed by Paragraph 4 constitute "liabilities or obligations . . . assumed by Buyer [Beazer] under this Purchase Agreement." *Id.* Thus, if Paragraph 4 encompasses CERCLA liability, Beazer would be required to indemnify Mead under Paragraph 8(b) of the Agreement.

> Beazer will be responsible for complying with orders issued by the EPA regarding solid waste.

Magistrate Judge's Report at 15. The magistrate judge construed Paragraph 4(c) as a promise by the buyer and its successors to indemnify the seller and its successors against all environmental liabilities associated with the Coke Plant.

In doing so, the magistrate judge decided that Paragraph 4(c)'s textual reference to future "orders" issued by state, local, and federal agencies contradicted the more restrictive interpretation of Paragraph 4(c) which Beazer would have us infer from the specific list of permits mentioned in Exhibit F Paragraph 4(c). If Paragraph 4(c) were confined to the permits listed in Exhibit F, the magistrate judge reasoned that Paragraph 4(c)'s reference to permits, licenses, and orders "hereafter issued" would be meaningless. Thus, he concluded that Paragraph 4(c) did include all subsequent orders, permits, and licenses relating to environmental liability including those required or issued under CERCLA. Accordingly, the magistrate judge made the recommendation the district court accepted in granting summary judgment to Mead and dismissing Beazer's claim for contribution under CERCLA.

Paragraph 4(c) does expressly make Beazer responsible for "solid waste . . . permits issued by [EPA]," but it has as additional limiting language; "all in accordance with applications now pending and listed on Exhibit F hereto." Therefore, Beazer contends that the magistrate judge erred when he concluded that Paragraph 4(c) clearly and unambiguously transferred Mead's CERCLA liability to Beazer. Beazer first argues that Paragraph 4(c) is no more than a "window" provision, common in commercial agreements for the sale of assets, which gives a seller interim protection against a buyer's failure to comply with the conditions of any existing environmental permits that are specifically listed, as they are here in Exhibit F. Thus, Beazer argues that the magistrate judge erred when he

failed to consider the parties' basic decision to structure the sale as a purchase of assets. Beazer would have us infer that the decision to buy and sell assets was mutually agreed on for the express purpose of limiting the purchaser's liability. We think Beazer's argument that purchasers under asset purchase agreements normally assume only those debts, obligations, and liabilities of the seller that are expressly identified in the agreement is plausible and that the district court's holding that Beazer must indemnify Mead would be inconsistent with that purpose. Nevertheless, we have been unable to find any evidence in this record that would unambiguously confirm that interpretation, and the text of Paragraph 4(c) is at least arguably to the contrary. *Cf. Watts v. TI, Inc.*, 561 So. 2d 1057, 1059-60 (Ala. 1990). Therefore, we conclude that Beazer's argument about the nature and purpose of framing a transfer of a business enterprise as a sale of assets begs the question on Paragraph 4(c)'s meaning.

Beazer's argument that the language of Paragraph 4(c) is not clear enough to transfer Mead's CERCLA liability to Beazer under Alabama law is more telling. We conclude Paragraph 4(c) is ambiguous under the principles of Alabama law that guides determinations of contracts. *See Reeves Cedarhurst Dev. Corp. v. First Amfed Corp.*, 507 So. 2d 184, 186 (Ala. 1992) ("An instrument is unambiguous if only one reasonable meaning clearly emerges.") (*quoting Vainrib v. Downey*, 565 So. 2d 647, 648 (Ala. Civ. App. 1990)). The provision is subject to more than one reasonable interpretation, and it is not plain enough to be construed as an unambiguous promise by Beazer to indemnify Mead against all environmental liability associated with the site of the Coke Plant, including liability without fault under laws like CERCLA, yet to be passed. Therefore, it does not square with the principle of Alabama law that promises to indemnify are limited to subjects plainly expressed.

Moreover, cases outside Alabama which have held a release or indemnification provision covers CERCLA liability have all involved indemnity clauses with much broader and more inclusive language than here. *See, e.g., Kerr-McGee Chem. Corp.*, 14 F.3d at 326-27; *Olin Corp.*, 5 F.3d at 12-13; *Hardage*, 985 F.2d at 1434; *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296, 1300 (6th Cir. 1992); *Mardan Corp.*, 804 F.2d at 1461-62. *The Olin Corp.* case provides one recent example. [8] The court of appeals held that this provision evidenced a "clear and unmistakable intent" to transfer the seller's environmental liability to the buyer, even future and unknown liability. *Olin Corp.*, 5 F.3d at 15-16.

The court of appeals held:

> In no uncertain terms, [the purchaser] agreed to assume the liability for losses resulting from "the maintenance of any . . . claim . . . concerning pollution or nuisance . . . ." The indemnity provision covers all pollution and nuisance claims without limitation . . .

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[8] The sale agreement in *Olin Corp.*, originally provided:

> [The buyer] hereby assumes and agrees to be responsible for and to pay, perform, discharge and indemnify [the seller] against, all liabilities (absolute or contingent), obligations and indebtedness of [the seller] related to the Aluminum Assets . . . as they exist on the Effective Time or arise thereafter with respect to actions or failures to act occurring prior to the Effective Time.

Olin Corp., 5 F.3d 10, 12-13.

A later agreement in *Olin Corp.* stated:

> In consideration of the payment on this date by [the seller] to [the buyer] of $3,700,000 . . . [the buyer] hereby releases and settles all claims of any nature which [it] now has or hereafter could have against [the seller] . . . whether or not previously asserted, under or arising out of the Purchase Agreement . . ., or the transactions contemplated thereby.

Id. at 13 (footnote omitted).

> [and makes the purchaser] responsible for any liability imposed . . . under CERCLA.

Id. at 327 (footnote omitted).

The contradictory terms and references of this Agreement leave us with no firm conclusion as to the clear and unmistakable intent of the parties. Under applicable principles of Alabama law, the parties failed to express the intent to indemnify with the requisite clarity. We hold, therefore, that Paragraph 4(c) is not specific enough to impose on Beazer a duty to indemnify Mead for their CERCLA reponse costs.

D.

Because Paragraphs 4(c) and 8 refer circuitously to each other, it follows therefore that neither Paragraph 4(c) nor Paragraph 8 expressly require either party to indemnify the other. [9]

In the *Kerr-McGee* case the indemnification clause read:

> [The Purchaser] expressly agrees to indemnify and to defend and hold [plaintiff's predecessor Moss-American], it's officers, employees, and agents, free and harmless from and against any and all claims, damages, judgments, fines, penalties, assessments, losses, expenses, including interest, court costs and attorney fees, however the same may be caused, arising out of or resulting from, directly or indirectly, the following: (a) the purchase, dismantling or sale of the personal property and real property by [the purchaser]; (b) the maintenance of any action, claim or order concerning pollution or nuisance; and (c) the property and real property.

Kerr-McGee Chem. Corp., 14 F.3d at 326-27 (emphasis added)(footnote omitted); *see also John S. Boyd Co.*, 992 F.2d at 403-04 (construing a provision stating that "[the successor corporation] agreed to assume 'all the duties and liabilities of [its predecessor] related to [the] gas business'" and that "[the successor corporation] agreed to 'indemnify and save harmless [the predecessor] from any duty or liability with respect to the gas business.'").

[9] Mead's duty to indemnify Beazer is set forth in Paragraph 8(a) of the Agreement. It is quoted in full *supra*, Part 1, typescript at 5. It requires Mead,

Accordingly, our earlier analysis requires us to reject Beazer's argument that Paragraph 4(c) was intended to limit Beazer's assumption of liabilities to those expressly listed in Exhibit F, and that therefore because CERCLA is not a listed obligation Mead must indemnify Beazer under Paragraph 8(a). Beazer relies on the grammatical rule of the last antecedent to assert that the language "all in accordance with . . . Exhibit F" is a limitation on the preceding reference to "solid waste disposal . . . order" in support of its argument that the magistrate judge's construction of Paragraph 4(c)'s phrase "all in accordance with" Exhibit F to mean which includes Exhibit F must fail. The phrase "all in accordance with" can be interpreted as Beazer would have it, but it does not compel that construction. Beazer's contention that the magistrate judge erred when he concluded the limitation of Paragraph 4(c) to the permits expressly listed in Exhibit F would leave the words "hereafter issued" without meaning does not persuade us. As we have already explained, its argument that these words merely reflect an intent to protect the seller during a transition period immediately following the transfer of assets to the buyer fails to shine through the murky text of Paragraph 4(c). Beazer's suggested interpretation of the words "hereafter issued" as limited to permits or licenses that might result from the pending applications is again plausible, but not so plain as to justify its construction under the Alabama rule that indemnity provisions must be strictly construed and limited to their plain meaning.

E.

Paragraph 4(c) does not clearly state that Beazer has agreed to assume all liability for toxic wastes under present or future laws protecting the environment. Though the phrase in Paragraph 4(c), "hereafter issued," appears to look to the future, the

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the seller, to indemnify Beazer, the buyer, against all liabilities other than those "expressly assumed by the Buyer." Paragraph 8(b), quoted *supra* in note 7, is its mirror image. It requires Beazer, the buyer, to indemnify Mead, the seller, against all liabilities "assumed by Buyer."

phrase "all in accordance with" appears to limit the buyer's environmental liability to orders, permits and licenses that are listed in the exhibit referenced. Accordingly, nothing in this agreement demonstrates a clear and unambiguous intent to transfer all CERCLA liability to Beazer.

Our refusal to construe Paragraph 4(c) as a clear promise by Beazer to indemnify Mead against CERCLA response costs leaves both Beazer and Mead responsible for their fair share of the cleanup costs associated with the Coke Plant. That result reinforces CERCLA policy. "Congress enacted CERCLA, a complex piece of legislation . . . to force polluters to pay for costs associated with remedying their pollution." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992). Thus, we will reverse the district court's entry of summary judgment in favor of Mead and remand this case for further proceedings on Beazer's contribution claim.[10]

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[10] Section 9613(f) provides, in relevant part:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.
>
> * * *
>
> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement . . . .

42 U.S.C.A. § 9613(f)(1), (3)(B)(West Supp. 1994). The magistrate judge determined that Mead was a "responsible party" for purposes of CERCLA liability. It declined, however, to apportion the response costs or reach Mead's or Beazer's contribution claims under section 9613(f) because it found that Beazer had agreed to indemnify Mead for all CERCLA liability under Paragraph 4(c) of the Agreement. On remand, the trial court will have to revisit the parties' contribution claims and correspondingly apportion liability for the attendant CERCLA response costs.

IV. CONCLUSION

The order of the district court granting summary judgment on Mead's counterclaim and the order dismissing Beazer's claim for contribution will be reversed and the case will be remanded to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3372

BEAZER EAST, INC.,

Appellant,

v.

THE MEAD CORPORATION,

Appellee.

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 91-00408)

Present: Becker, Hutchinson and Cowen, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on February 15, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 30, 1993, be, and the same is hereby reversed and the cause is remanded to the District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/_____
Clerk

Dated: September 12, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3372

BEAZER EAST, INC.,

Appellant,

v.

THE MEAD CORPORATION,

Appellee.

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 91-00408)

SUR PETITION FOR PANEL REHEARING

Present: Becker, Hutchinson And Cowen, *Circuit Judges*

The petition for panel rehearing filed by appellee in the above captioned matter having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

By the Court,

/s/_____
William D. Hutchinson
Circuit Judge

Dated: November 25 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BEAZER EAST, INC.,

Plaintiff,

v.

THE MEAD CORPORATION,

Defendant.

Civil Action No. 91-408
Chief Judge Diamond
Magistrate Judge Benson

MEMORANDUM ORDER

On April 29, 1991, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §636 (b) (1) (A) and (B), and Rules 3 and 4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on May 12, 1993, recommended that plaintiff's motion for partial summary judgment (Docket No. 47) be granted in part and denied in part, and that defendant's cross-motion for summary judgment (Docket No. 58) be granted and the case be dismissed since plaintiff has assumed the responsibility for complying with orders issued by the EPA with respect to the site in question. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all counsel by first-class mail on May 12, 1993. Objections were filed by plaintiff on May 24, 1993 and on June 3, 1993, defendant filed a response to plaintiff's objections. After *de novo* review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 30th day of June, 1993;

IT IS HEREBY ORDERED that plaintiff's motion for partial summary judgment (Docket No. 47) is granted in part and denied in part, and that defendant's cross-motion for summary judgment (Docket No. 58) is granted and the case is dismissed.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated May 12, 1993 (Docket #100), is adopted as the opinion of the court.

/s/
GUSTAVE DIAMOND
Chief United States District Judge

cc: Honorable Kenneth J. Benson
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BEAZER EAST, INC.,

Plaintiff,

v.

THE MEAD CORPORATION,

Defendant.

Civil Action No. 91- 408
Chief Judge Diamond
Magistrate Judge Benson

MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that plaintiff's motion for partial summary judgment (Docket No. 47) be granted in part and denied in part, and that defendant's cross-motion for summary judgment (Docket No. 58) be granted.

II. REPORT

This is an action commenced by Beazer East, Incorporated, ("Beazer") a Delaware Corporation with its principal office and place of business in Pittsburgh, Pennsylvania, against The Mead Corporation ("Mead"), an Ohio corporation with its principal office and place of business in Dayton, Ohio. The action seeks contribution for present and future expenses that will be incurred in the proposed cleanup of the Woodward Facility, an industrial site near Dolomite, Alabama. The original complaint and amended complaint were pleaded in nine counts. Disposition of Mead's motion to dismiss has reduced the amended complaint to three counts, the first two alleging causes of action pursuant to the Comprehensive Environmental Response, Compensation

and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*, and the third alleging a cause of action for indemnity based upon the purchase agreement under which Beazer acquired the Woodward Facility from Mead in 1974.

Mead has asserted four counterclaims. The first count alleges that the purchase agreement included a provision whereby Beazer agreed to indemnify, hold harmless and reimburse Mead for the response costs sought by Beazer in its complaint. The second count alleges a breach of the purchase agreement in that Beazer agreed to comply with all relevant environmental orders and regulations, but has not done so. Mead seeks its costs and expenses in defending this action. The third and fourth counterclaims are for contribution under CERCLA.

Beazer has filed a motion for partial summary judgment (Docket No. 47) seeking a declaration that Mead is a responsible party pursuant to §§107(a) and 113(f) of CERCLA (but leaving for another day the issue of allocation of response costs between the parties), and that Mead owes it a duty of indemnification pursuants to the purchase agreement. Mead has filed a motion for summary judgment (Docket No. 58) seeking a ruling that Beazer, in the purchase agreement, agreed to assume any liability Mead may have for the response costs sought in Counts I and II of the complaint. Mead seeks summary judgment with respect to Count III of the complaint, asserting that it did not agree to indemnify Beazer for CERCLA response costs. The motions have been extensively briefed, numerous exhibits have been provided by the parties, and argument was held on April 8, 1993. The motions are ripe for disposition.

FACTUAL BACKGROUND

The Woodward Facility was operated from 1905 until 1968 by Woodward Iron Company as a coke and coke by-products manufacturing facility. In 1968, Woodward Iron Company

merged with Mead. Mead, in turn, operated the facility until 1974, when it sold the facility and surrounding land to Koppers Company, Inc., ("KCI"), Beazer's predecessor-in-interest. The purchase agreement is the source of great dispute in this matter, and will be addressed below. In 1977, the facility and surrounding land were transferred to the Industrial Development Board of the City of Fairfield, Alabama, and KCI immediately leased the premises back and continued to operate the facility. KCI was acquired by Beazer in 1988, and the facility was immediately transferred to a new corporation, Koppers Industries, Inc. ("KII"). Also in 1988, the Industrial Development Board of the City of Fairfield transferred its ownership interests in the facility and surrounding land to KII.

The Woodward Facility has been the object of an investigation by the Environmental Protection Agency and the Alabama Department of Environmental Management since 1981 which has culminated in the EPA seeking an Administrative Order on Consent which would require Beazer to conduct a site-wide environmental investigation leading, in time, to actual cleanup of the site. On June 21, 1991, Beazer signed a final "Administrative Order on Consent," issued pursuant to the Solid Waste Disposal Act, which identifies 39 problem areas of the Woodward Facility which are described in the order as "solid waste management unit[s]." Beazer alleges that much of the proposed investigation will be directed to areas in or adjacent to the Woodward Facility which were utilized solely by Mead during its operation of the facility, and, therefore, that Mead is responsible for the costs associated with the investigation and cleanup of those areas.

The first issue presented by the cross-motions for summary judgment filed in this case is whether Mead is a responsible party pursuant to CERCLA. The parties then disagree concerning the import of the purchase agreement. Beazer asserts that Mead is obligated thereby to indemnify Beazer for environmental liabili-

ties. Mead asserts that Beazer agreed to assume Mead's environmental liabilities, at least to the extent of any orders from the EPA involving solid waste.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if, drawing all inferences in favor of the non-moving party, ". . . the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, and for which that party will bear the burden of proof at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the non-moving party must set forth ". . . specific facts showing that there is a *genuine issue for trial* . . ." or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

CERCLA "RESPONSIBLE PARTY" STATUS

In order to establish liability under CERCLA, the plaintiff must prove that, 1) defendant is, or was at the time of disposal, the owner or operator, 2) of a facility, 3) at which there was a release or threatened release of a hazardous substance, and 4) which caused another person to incur response costs. 42 U.S.C. §9607; *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 258-59 (3d Cir. 1992); *Kelly v. Thomas Solvent Co.*, 790 F. Supp. 710

(W.D.Mich. 1990). Here, there is no dispute that Mead owned the Woodward Facility from at least 1968 through 1974, and that coal tar sludge, a hazardous substance identified in the EPA order at issue, was disposed of at the facility, or "released." Thus, Beazer has carried its burden of proving that Mead meets the first three elements of the test for liability under CERCLA. Mead, however, asserts that Beazer has failed to establish its entitlement to summary judgment with respect to the fourth element, since it has failed to establish that Mead is solely responsible for any of the response costs, i.e., Beazer has failed to establish that the response costs are "divisible."

In order to be held to be a responsible party under CERCLA, it is sufficient that some response costs are incurred due to the release by the party in question. *See, Kelley, supra.* Here, Beazer has certainly incurred response costs at the Woodward Facility. Further, since Mead is responsible for at least some of the coal tar sludge dumped on the site, at least some of the response costs incurred by Beazer, or which will be incurred by Beazer, must be attributable to Mead's actions while operating the facility. This is sufficient to support a finding that Mead is a responsible party under CERCLA.

Divisibility, on the other hand, is an issue only after more than one party has been determined to have been responsible for the release of hazardous substances at a single site. Liability under §9607 is joint and several, except where the harm is determined to be divisible. *Kelley, supra.* Thus, if two parties have each contributed to the contamination of a site, they are each subject to liability for the entire cost of remediation, unless it can be proven that the harm caused by the parties is divisible. Here, Beazer has not even attempted to apportion the harm. Rather, Beazer seeks only a declaration that Mead is jointly liable for the contamination of the Woodward Facility. As noted above, Beazer is entitled to such a ruling. Apportionment of the response costs may be

left for another day. *Id.*[1] It is at that point, if it is ever reached, that divisibility of harm will become relevant.

CONTRACTUAL PROVISION

Even though Mead qualifies as a responsible party under CERCLA, it may nonetheless be entitled to summary judgment on the CERCLA claims if, as Mead alleges, Beazer has agreed to assume liability in this regard. Mead relies upon the purchase agreement in asserting that Beazer did just that. Beazer, on the other hand, alleges in count three of its complaint that Mead agreed to indemnify Beazer for environmental liability, and seeks summary judgment in its own right, again relying on the provisions of the purchase agreement. In this respect, CERCLA provides as follows:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold

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[1] Mead's reliance on *Kelley* is misplaced. In a prior opinion in the same case, *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532 (W.D.Mich. 1989) (Kelley I), the court found Thomas Solvent jointly and severally liable due to proof that a release of hazardous substances had occurred at a time when Thomas Solvent owned and operated the facility in question. The court in Kelley I properly left for a later time the question of apportionment of response costs. In the latter opinion, Kelley II, the court was faced with a claim that Thomas Solvent was responsible for *all* response costs. Since the plaintiff was also jointly and severally liable due to its own release of hazardous substances when it operated the facility in question, and no evidence of divisibility had been presented, the court denied the motion for summary judgment, and deferred ruling on apportionment until some equitable means of apportioning response costs could be arrived at. The court did not, at any time, indicate that liability under CERCLA is reliant upon proof of divisibility of harm.

> harmless or indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9706(e)(1). This strangely worded provision has been consistently interpreted as allowing hold-harmless or indemnity agreements between jointly responsible parties. Thus, "agreements to indemnify or hold harmless are enforceable between the parties." *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). Interpretation of the provisions of the 1974 purchase agreement will dispose of the issues remaining with respect to the cross-motions for summary judgment, since a valid agreement by Beazer to indemnify or hold Mead harmless would be dispositive of Mead's responsibility for contribution under CERCLA, and an agreement by Mead to indemnify Beazer for any costs incurred due to hazardous substances released by Mead would, in effect, mirror Mead's existing CERCLA liability.

First, it must be determined what law the court should follow in interpreting the provisions of the purchase agreement. The agreement provides that "[e]ach of the parties elects that this Purchase Agreement shall be governed, construed and enforced in accordance with the laws of the state of Alabama." I see no reason to frustrate the obvious and expressed intent of the parties to have the contract provisions interpreted pursuant to Alabama law.

Interpretation of contractual terms is a function of the court. *Royal Cup, Inc. v. Jenkins Coffee Service, Inc.*, 898 F.2d 1514 (11th Cir. 1990) (applying Alabama law). Where the terms of a contract are clear and unambiguous, extrinsic evidence is not permitted to contradict those terms. *Southern United Life Ins. Co. v. Gregory*, 508 So. 2d 247 (Ala. 1987). In determining whether a contract is ambiguous, the court must read the language used as an ordinary man would understand it, and should give all terms their usual and ordinary meaning. *Liggans R.V.*

Center v. John Deere Ins. Co., 575 So. 2d 567, 571 (Ala. 1991). A contract term may not be read in isolation, but must be construed in light of the agreement as a whole. *Id.* If a release of liability is unambiguous in its terms, Alabama courts will enforce that release. *Boggan v. Waste Away Group, Inc.*, 585 So. 2d 1357, 1360 (Ala. 1991). An issue present in this case, and which is not conclusively resolved by any Alabama case, is whether or not a release or indemnity provision of a contract can be effective with respect to CERCLA liability when CERCLA had not been enacted at the time the contract was entered into. In this respect, federal courts have held that pre-CERCLA agreements will be sufficient to cover CERCLA liability if they are worded broadly enough to encompass any and all liabilities, or if environmental liability is clearly referred to in the agreement. *See, e.g., Hatco Corp. v. W.R. Grace & Co.-Conn.*, 801 F. Supp. 1309, 1318 (D.N.J. 1992); *Purolator Products Corp. v. Allied-Signal, Inc.*, 772 F.Supp. 124, 132 (W.D.N.Y. 1991); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 356 (D.N.J. 1991); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D.N.J. 1991). I find nothing in Alabama law which is inconsistent with this standard, and, hence, will apply it in this instance, after first determining just what the contract provides for under Alabama law. [2]

The specific provision in question is paragraph 4 of the purchase agreement entitled "*Assumption of Agreements and Liabilities*", which provides as follows:

> As of the Closing Date, Buyer shall assume and agree to perform:

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[2] Since Alabama law is not inconsistent with the standard utilized by federal courts, I need not decide whether federal or state law should control the issue of the sufficiency of an indemnity clause for CERCLA liability. I note, however, that this may be an issue best determined by a uniform federal rule in any event, and that the federal case law establishing the standard under CERCLA may override any inconsistent state law in this respect.

a. All of the Coke Plant obligations under the commitments, purchase orders, and contracts which constitute Coke Plant Assets (being those listed on Exhibit B hereto) in accordance with Section 2 hereof to the extent performance thereunder is required after the Closing Date, and all other commitments, liabilities and obligations expressly assumed by Buyer pursuant to this Purchase Agreement.

b. Obligations of the Coke Plant to make payments in respect of those taxes and other expenses deducted from the Purchase Price as hereinafter provided and not otherwise specified to be assumed above.

c. Obligations of the Coke Plant to comply from and after the Closing Date with all of the terms and conditions of any NPDES permit issued by the United States Environmental Protection Agency or the then permitting authority, any permit or order issued by the Alabama Water Improvement Commission and the Alabama Air Pollution Control Commission of the State of Alabama or any successor authority, any license, permit or order issued by the Jefferson County Department of Health, and of any other wastewater or runoff water discharge permit, license or order, air pollution permit, license or order, solid waste disposal permit, license or order, hereafter issued by the United States Environmental Protection Agency and/or by the State of Alabama and/or any of its political subdivisions, all in accordance with applications now pending and listed in Exhibit F hereto.

The exhibit referred to in the last sentence of paragraph 4(c) is entitled "List of Environmental Applications and Permits," and is divided into two parts, one for permits related to air, and one for permits related to water. The permits are listed with reference to their date of issuance and issuing authority. Beazer argues that this provision merely requires it to comply with the permits listed in Exhibit F, and does not act as an assumption of any other environmental liabilities with respect to the Woodward Facility. It is undisputed that the response costs here have no relation to the permits listed in Exhibit F. Beazer further argues that, since the contract provides that Mead will indemnify Beazer for all liabilities except those specifically assumed, that Mead owes a contractual duty of indemnification for the response costs incurred here. The key to Beazer's argument is its interpretation of the final sentence of Paragraph 4(c) referring to Exhibit F. I cannot agree with Beazer that the reference to Exhibit F expresses the intention of the parties to limit Beazer's liability to the permits listed therein.

First, if it had been the parties' intention to limit Beazer's environmental responsibility to the permits listed, they could have done so without referring, as they do, to both present and future "orders" issued by state, local and federal agencies. Second, the phrase "all in accordance with" does not necessarily operate to limit the language preceding it. The order in this case issued by the EPA to remedy a solid waste problem, although not governed by the permits listed in Exhibit F, is still in accordance with those permits. Put simply, remedying hazardous waste disposal sites would be in conformity with the purpose of the permits, even if not governed thereby. Further, reading the clause in the fashion suggested by Beazer would have the effect of making meaningless many of the terms used in paragraph 4(c). The exhibit lists only permits in existence at the time of the agreement, or that had been applied for at that time. Paragraph 4(c), however, speaks broadly concerning the obliga-

tion of Beazer to comply, from the closing date forward, with not only permits, but also licenses and orders "hereafter issued" by state, local and federal authorities. A court must give all of the provisions of a contract a reasonable interpretation if possible. *Shadrick v. Johnston,* 581 So. 2d 805, 810 (Ala. 1991); *Federal Land Bank of New Orleans v. Terra Resources. Inc.,* 373 So. 2d 314, 320 (Ala. 1979). Reading paragraph 4(c) in the fashion suggested by Beazer would have the effect of eliminating the term "hereafter issued" since Beazer would have the obligation described apply only to the permits listed, which were either already in effect or had been applied for. It would also make surplusage of the language concerning solid waste "permits, licenses and orders" since the exhibit contains only air and water permits. Finally, the use of the expansive term "any" referring to the permits, orders and license with which Beazer was agreeing to comply, would be expressly contradicted by limiting the application to specific permits listed. In short, to read paragraph 4(c) in the fashion suggested by Beazer would require that a substantial portion of the language used be ignored. This would not be a reasonable interpretation of contractual language. Instead, the paragraph should be read as setting forth environmental liabilities assumed by Beazer which include the permits listed in Exhibit F. In this way, effect can be given to all of the provisions of paragraph 4(c). Thus, paragraph 4(c) cannot be read as a matter of law to exclude the order in question here from Beazer's assumed responsibilities.

Next, it must be determined if the contract unambiguously requires Beazer to assume Mead's responsibility for its portion of the response costs in this matter.

Mead points out that the response costs incurred by Beazer at the Woodward Facility have been incurred pursuant to an order entered by the EPA, after the 1974 sale to Beazer,

regarding the disposal of solid wastes. Paragraph 4(c) expressly references "orders" issued by the EPA regarding "solid waste" issued after the closing date. I am constrained to agree with Mead that the only reasonable interpretation of paragraph 4(c) of the purchase agreement is to transfer to Beazer all responsibility for complying with the order issued by the EPA in this case.

Beazer makes numerous arguments against reading the agreement in this fashion. Beazer's fundamental position, that Paragraph 4(c) is limited to the permits listed, has been rejected. Beazer also asserts, however, that the language of 4(c) is not the type of broad, all-inclusive language which other federal courts have held sufficient to encompass CERCLA liability. Cases which have addressed the issue of pre-CERCLA indemnity or assumption provisions have found that either broad language transferring all liability, or language transferring environmental liability inclusive of CERCLA-type liability, is sufficient to effect an assumption of CERCLA liabilities, even though the agreement antedates the enactment of CERCLA. *Purolator Products Corp. v. Allied-Signal, Inc., supra*; *Mobay Corp. v. Allied-Signal, Inc., supra*; *Southland Corp. v. Ashland Oil, Inc., supra*. This case does not involve a broad, all-inclusive indemnity provision. *See, e.g., Purolator*, 772 F.Supp. at 131 (where buyer agreed to assume and satisfy "all liabilities and obligations of " the seller relating to the assets purchased). However, the language used does indicate the intent of the parties that Beazer be responsible for compliance with all "permits, licenses and orders" issued by state, local and federal authorities. "[T]o create a contractual duty of one party to indemnify or hold the other harmless from CERCLA-like liability arising from the other's acts, an unmistakable intent to do so must be expressed in unambiguous terms or clearly implied." *Hatco,* 801 F.Supp. at 1318. Here, the language used clearly implies that, as between Beazer and Mead, Beazer would be responsible for any environmental liability arising from the Woodward Facility after the

date of sale. Even more than this implication regarding all environmental liability, the provision expressly provides that Beazer will be responsible for complying with orders issued by the EPA regarding solid waste. Thus, in this case, there is more than simply a general transfer of environmental liability. Indeed, there is a specific delegation of the responsibility for complying with EPA orders. The purchase agreement clearly requires Beazer to assume all liability for the response costs in this case, which arise from an order issued by the EPA regarding solid waste.[3]

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[3] The parties have spent a great deal of time and effort addressing the knowledge each had at the time of the sale, and the stage of development that environmental regulation had reached at the time the contract was entered into. There is no doubt that sophisticated parties negotiated the purchase agreement in an arms-length transaction. Apart from this, there is no other inquiry necessary into the knowledge each party had upon signing the contract, since the terms of the contract are unambiguous. Further, the substantial effort by each party to establish either the foreseeability or nonforeseeability of CERCLA's remedial provisions is, I believe, beside the point. Foreseeability is not the issue. In fact, the courts have held expressly that parties cannot be held to have foreseen CERCLA prior to its enactment. *Mobay*, at 1288. Courts look instead to the expressed intent of the parties concerning liabilities in general and, where appropriate, to their expressed intent with respect to environmental liabilities specifically. If a party has assumed all environmental liability, it does not matter that it failed to predict that Congress would vastly expand those liabilities. By the same token, if a party has, as has Beazer, assumed the responsibility of complying with all EPA orders concerning solid waste, it cannot be heard to complain that the EPA's powers were subsequently expanded to allow it to force remediation of a private site. Thus, although the parties have spent a great deal of effort on developing the issue of knowledge and the state of the law at the time of contracting, and have, quite frankly, done a tremendous job of presenting that dispute for consideration, the matters are simply not relevant to the pending motions.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that plaintiff's motion for partial summary judgment (Docket No. 47) be granted in part and denied in part, and that defendant's motion for summary judgment (Docket No. 58) be granted and the case be dismissed since plaintiff has assumed the responsibility for complying with orders issued by the EPA with respect to the site in question.

In accordance with the Magistrates Act, 28 U.S.C. Section 636 (b) (1) (B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report.

/s/

KENNETH J. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated: May 12, 1993